



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: ICF Kaiser Engineers, Inc.

File: B-271079.3; B-271079.4; B-271079.5; B-271079.7

Date: July 15, 1996

Kenneth B. Weckstein, Esq., and Jose Otero, Esq., Epstein, Becker & Green, P.C., for the protester.

Joseph J. Petrillo, Esq., and Karen D. Powell, Esq., Petrillo and Associates, for Lockheed Environmental Systems & Technologies Company, an intervenor.

L. Carol Roberson, Esq., and Karen J. Carroll, Esq., Environmental Protection Agency, for the agency.

Mary G. Curcio, Esq., David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against award to offeror whose proposal received a lower technical score than protester's is denied where, although solicitation stated that technical considerations were more important than cost, the agency reasonably determined that the greater technical merit of the protester's proposal was not worth its significantly higher cost.

DECISION

ICF Kaiser Engineers, Inc. protests the Environmental Protection Agency's (EPA) award of a contract to Lockheed Environmental Systems & Technologies Company, under request for proposals (RFP) No. D500055R1, for Environmental Service Assistance Team (ESAT) support services for various EPA programs. Kaiser challenges the technical and cost evaluation.

We deny the protest.

The solicitation contemplated the award of cost-plus-award-fee or cost-plus-fixed-fee, level-of-effort contracts to furnish ESAT support services for four separate geographical areas--this protest concerns the Western Zone--for a 1-year base period with four 1-year options. The statement of work required the contractor to: establish ESAT work teams to collect and analyze chemical and biological test samples, review test data to assess quality and completeness, and provide logistical and administrative support to field, analytical and quality assurance activities.

The solicitation provided for award to be made to the responsible offeror whose conforming proposal was most advantageous to the government. The RFP listed the following technical evaluation factors, which were to be point scored:

- I. Management
 - A. Management Plan
 - 1. Contract Start Up and Mobilization Plan (100 of 1,000 available total points)
 - 2. Management Structure (100)
 - B. Management Information System (100)
- II. Personnel
 - A. ESAT Team Manager and Zone Manager (100)
 - B. ESAT Key Team Personnel (200)
- III. Corporate Experience (100)
- IV. Technical
 - A. Quality Assurance Program Plan (100)
 - B. Hazardous Samples and Data Review (100)
- V. Sample Situation Scenarios (100)

The solicitation further provided that the government would consider "other factors, as listed below in descending order of importance, secondary to both technical quality and cost or price": (1) status as a small business concern which is also a labor surplus area concern; (2) status as a small business concern; (3) status as a labor surplus area concern; and (4) "[r]ecord of past performance." The RFP stated that while technical quality was more important than cost in the award decision, "as proposals became more equal in their technical merit, the evaluated cost or price becomes more important," and "as the technical merit and the evaluated cost or price becomes essentially equal, other factors may become a determining factor."

Two proposals for the Western Zone, from Kaiser and Lockheed, were received. Both were included in the competitive range; three rounds of discussions and best and final offers (BAFO) followed. Although Kaiser's BAFO received the highest technical score (922 points), 103 points higher than Lockheed's (819 points), the evaluated cost of Kaiser's BAFO (\$78,255,207) was determined to be at least \$12,800,273 more than Lockheed's (\$65,454,934). (While EPA considered Lockheed's proposed costs to be realistic, it considered Kaiser's proposed indirect rates to be unsupported and as a result believed that there was a risk that Kaiser's costs could be even higher.) After reviewing the technical evaluation panel (TEP) report and performing an analysis of the proposals under each major evaluation factor, the source evaluation board (SEB) concluded that Kaiser's proposal did "not offer

technical superiority that was worth its much higher costs"; the SEB therefore recommended that award be made to Lockheed based on its much lower evaluated cost. The source selection official (SSO), after reviewing the TEP and the SEB reports, as well as other relevant documents, agreed with the recommendation and selected Lockheed for award.

Kaiser argues that, given Lockheed's lower technical score, EPA could not reasonably determine that there was only a slight difference in the technical merit of the two proposals and that, as a result, the award decision was improperly based on Lockheed's lower cost.¹

There is no dispute that Kaiser's proposal was technically superior to Lockheed's. The issue here is whether the technical superiority of Kaiser's proposal was worth its substantially higher cost. In concluding that it was not, the SEB noted that while Kaiser's proposal offered "a few more superior features" than Lockheed's, Kaiser's proposal possessed "only a slight technical advantage" and there was "not a substantial difference in the quality of the technical proposals"; it considered both proposals to be "superior overall," offering "superior technical capabilities [with] no significant weaknesses identified in either proposal that would present a risk to successful contract performance." According to the SEB, "[s]election of either of the offerors would permit an effective and efficient working plan to be quickly implemented and full productivity to be quickly achieved and maintained."

Turning to some of the specifics of the evaluation, the SEB found that, while Kaiser's approach to mobilization offered more superior features, any advantage offered would dissipate within 60 days after award. The SEB also found that, while Kaiser's proposal demonstrated a "slightly greater depth" of experience in managing similar-sized and related-subject contracts, the learning curve for either offeror was likely to be "very short," inasmuch as both had sufficient "embedded" corporate experience to be able to overcome contract start-up problems quickly and manage the contract. Likewise, while the SEB recognized that Kaiser's proposed team managers had more direct bench and relevant managerial experience and that its key team personnel had a "slightly greater depth of relevant experience," it found that this did not translate into a significant advantage. This is because Lockheed's

¹Kaiser also argues that the SSO did not adequately document his decision in his one-paragraph source selection document. The source selection document, however, clearly indicates that the SSO based the award decision on information set forth in the SEB and TEP reports, the competitive range determination and the negotiation memorandum. The SSO's reliance on these documents and incorporation of them into his decision document provides adequate documentation for the award decision. See generally TRW, Inc., B-260788.2, Aug. 2, 1995, 96-1 CPD ¶ 11.

proposed managers exceeded the solicitation requirements and were entitled to a rating of 4--on a scale of 1 to 5--and its other proposed key personnel met or exceeded the solicitation requirements, were well qualified to handle the required level and complexity of tasks, and likewise were rated 4 on a scale of 1 to 5. In addition, the SEB found neither proposal to be superior under the management information system or quality assurance/hazardous samples subfactors.

While the agency believed that Lockheed's proposal contained weaknesses relative to Kaiser's proposal--for example with respect to the offerors' approach to management structure--it is clear that neither the TEP nor the SEB considered the relative weaknesses to be significant; according to the TEP, the "weaknesses are not felt likely to adversely affect the successful operation of the contract."

At the same time, the agency evaluated Lockheed's proposal as superior to Kaiser's in several respects. For example, the SEB found that both Lockheed's proposed zone and deputy zone managers had more direct bench and relevant managerial experience with contracts of similar scope, size, and complexity than Kaiser's zone manager. In addition, the SEB found Lockheed's approach to two of the four sample scenarios to be technically superior to Kaiser's, specifically criticized Kaiser's proposed approach to one sample problem as characterized by "throwing [level-of-effort] hours" at the problem and its approach to another as one which "lacks significant insight," and concluded that, overall, Lockheed's solutions to the sample problems were more relevant and efficient.

Thus, although Kaiser submitted a stronger technical proposal, the record indicates that Lockheed submitted a proposal that was superior to Kaiser's in some areas and overall was not viewed as substantially weaker. The record also establishes that EPA fully considered those relative strengths in Kaiser's proposal, but also measured those strengths against Kaiser's substantially higher cost. Nothing in the record establishes that EPA could not reasonably conclude that the advantages of Kaiser's proposal did not translate into technical superiority sufficient to warrant incurring Kaiser's significantly higher cost. See Blue Cross Blue Shield of Texas, Inc., B-261316.4, Nov. 9, 1995, 95-2 CPD ¶ 248; Northern Virginia Serv. Corp., B-258036.2; B-258036.3, Jan. 23, 1995, 95-1 CPD ¶ 36. Accordingly, we find no basis to object to the technical evaluation or the ensuing source selection.

Kaiser also argues, however, that EPA did not have a reasonable basis to conclude that Lockheed's proposal was less costly than Kaiser's because Lockheed's proposal was based on noncompliance with several solicitation requirements. We find that even after accounting for any advantage Lockheed gained from noncompliance with the solicitation requirements, the cost of Lockheed's proposal remained sufficiently lower than Kaiser's so that the award decision would have remained the same.

Kaiser argues that Lockheed's proposal was based on noncompliance with the solicitation provisions regarding the estimated level of effort. As noted by Kaiser, the solicitation required offerors to prepare their proposals based on a specified level of effort; Lockheed's approach departed from this requirement and resulted in a total level of effort (1,906,331 manhours) lower than the number of manhours specified in the solicitation (2,027,300 manhours).² However, although the SEB did not revise the evaluated cost of performance under Lockheed's proposal (\$65,454,934 based on the lower level of effort), it did specifically consider that raising Lockheed's level of effort would increase the cost of Lockheed's proposal (by up to \$4,158,866) when determining that Lockheed's proposal represented the best value to the government.³

Kaiser argues that Lockheed's evaluated cost advantage also resulted from noncompliance with the solicitation requirement regarding the substitution of key personnel. The solicitation generally prohibited offerors from substituting key personnel for 365 days after award. Although Lockheed's proposal included resumes and letters of intent for its proposed key personnel, it indicated that, if awarded the contract, Lockheed planned to hire qualified staff of the incumbent contractor (Kaiser) to fill key non-managerial positions. (Kaiser had required its employees to agree not to permit another offeror to submit their names for this procurement, which prevented Lockheed from proposing these individuals in the first place.) During discussions with Lockheed, EPA agreed to exclude from the 365-day no-substitution rule certain non-managerial positions in order that Lockheed could pursue incumbent personnel for these positions. Kaiser was not advised of this revision to the key personnel clause. (After award, Lockheed did request

²Kaiser also argues that EPA's consideration of Lockheed's proposal to combine the Western Zone office with the Eastern Zone office (the contract for which had been recently awarded to Lockheed) was inconsistent with the solicitation requirement to submit "complete separate proposals for each acquisition," the solicitation statement that "combined proposals will not be considered," and the estimated level of effort offerors were to use in preparing their proposals. Nothing in those provisions, however, precluded an offeror from taking advantage of the award of a contract for another zone by proposing a cost-saving consolidation of zone offices. To the extent that Lockheed proposed fewer manhours for the Western Zone office than specified in the solicitation, this has already been accounted for in Kaiser's calculation of the advantage Lockheed gained from proposing an overall level of effort lower than specified in the solicitation (as discussed above).

³The SEB, noting that both firms generally were proposing to provide the same number and mix of full time personnel to staff the ESAT teams, also concluded that the lesser number of productive hours proposed by Lockheed would not impact performance.

permission to substitute incumbent staff for 21 of 22 non-managerial positions specified in the revised key personnel--"Additional Key Personnel"--clause.) Kaiser claims that it could have lowered its proposed cost substantially had it been permitted to replace its higher cost incumbent personnel with lower cost personnel after award.⁴

While the change in the no-substitution clause technically was inconsistent with the language of the solicitation, the change had no effect on the competition. The change served the limited purpose of permitting Lockheed to replace certain proposed employees with incumbent personnel, which would give the agency the benefit of these technically superior personnel (Kaiser's incumbent staff was rated higher than Lockheed's proposed staff) if Lockheed were selected for award. Since Kaiser's proposal already was based on its own incumbent personnel, it was not in a position to benefit from the change in the clause, even if it had been advised of the change. Specifically, the change in the no-substitution clause would not have permitted Kaiser to propose the replacement of its higher cost incumbent personnel with unidentified lower cost personnel after award;⁵ again, the change was intended only to enable Lockheed to add certain of Kaiser's higher-rated incumbent personnel to its staff if it received the award.⁶

⁴In its submission dated July 12, 1996, Kaiser for the first time argues that had it been advised of the change in the 365-day no-substitution rule, it would have compensated for the loss of the competitive advantage it had obtained from requiring its employees to agree not to permit another offeror to submit their names for this procurement by proposing to cap its costs in other areas. Since Kaiser did not raise this argument until more than 6 weeks after it filed its protest against the relaxation of the no-substitution rule, this argument is untimely. 4 C.F.R. § 21.2(a)(2) (1996).

⁵Moreover, had Kaiser proposed to replace its incumbent personnel with unidentified individuals of unknown qualifications and experience, Kaiser's high technical score in this area would have been at risk. There is no reason to assume that Kaiser would have been willing to accept this risk; had Kaiser been inclined to replace the incumbent personnel for cost savings, it could have simply proposed to do so in its proposal.

⁶Kaiser also argues that EPA improperly failed to consider past performance in the award decision. Even if Kaiser is correct--and it is unclear that the agency acted improperly--Kaiser was not prejudiced by EPA's approach to the evaluation in this regard since the solicitation accorded past importance only minimal weight in the overall evaluation scheme.

We conclude that the record supports EPA's determination that Lockheed's proposed cost was substantially lower than Kaiser's--the cost of Kaiser's proposal remained at least \$8,641,407 higher than Lockheed's when evaluated on a comparable basis.⁷

The protest is denied.

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⁷Moreover, as noted by the SEB, the actual cost of Kaiser's proposal could be even higher than the cost used for evaluation purposes. Noting that Kaiser had changed its cost accounting practices and rate structure over the past 3 years and was planning major organizational changes that would result in cost-accounting changes, an agency auditor had recommended that indirect rate ceilings be established. Kaiser, however, proposed what the agency considered to be floating rate ceilings that afforded "only minimal protection" to the government. (EPA found that, in contrast, Lockheed had proposed firm limits on its indirect rates.) Since the auditor also found the back-up submitted by Kaiser in support of its proposed preliminary indirect rates to be "minimal," he was unable to determine the reasonableness of the proposed indirect rates. As a result, while EPA generally used the proposed rates for the evaluation, the agency determined that there was a risk that Kaiser's cost to perform could exceed the cost used for evaluation purposes.